

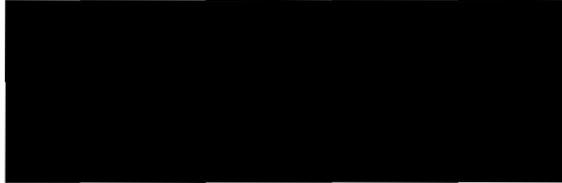
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 08 148 53792 Office: CALIFORNIA SERVICE CENTER Date: NOV 09 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

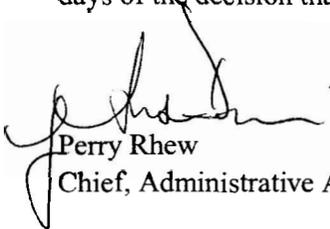
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides software consulting, development, implementation and education in business applications, that it was established in 1996, that it employs 125 persons, and that it has a gross annual income of \$12,741,292 and a net annual income of \$164,091. It seeks to employ the beneficiary as a software consultant from October 1, 2008 to September 18, 2011. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On September 9, 2008, the director denied the petition determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of “agent” at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it submitted a valid labor condition application (LCA) for all locations; or (4) the proffered position is a specialty occupation.

On appeal, the petitioner submits a statement and documentation in support of the Form-I-290B, and contends that the director’s decision is erroneous.

The record includes: (1) the Form I-129 and supporting documentation filed with U.S. Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial decision; and, (5) the Form I-290B and petitioner’s statement and documentation in support of the appeal. The AAO considers the record complete and has reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its March 31, 2008 letter appended to the petition that the beneficiary would work “independently as well as assist other technical professionals engaged in systems development” and would perform “tasks such as project planning, systems design & analysis, programming and testing.” The petitioner stated further:

[The beneficiary’s] responsibilities will include end-user requirements study and analysis, develop business functions, design the logical and physical data models, prepare Entity-Relationship diagrams, design data access functions, prepare input/output charts, develop functional specifications, provide detailed design specifications, prepare unit and system test plans, build the programs, develop test conditions, unit test the programs and co-ordinate the system test. He will also be responsible for system maintenance and support. He is expected to fix any problems the users encounter, enhance the system functionality, identify the system bottlenecks and redundant code and improve the data access, develop change-driven specifications, unit and system test the change driven programs.

His duties in this position include the study, analysis, design development, implementation and maintenance using his various technical skills. He will also prepare the user manuals, training materials and conduct end user training programs.

The petitioner also broke the beneficiary's tasks into the "build phase" and the "support and maintenance phase."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 28, 2008. In the request, among other things, the director: asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested that the petitioner submit copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In an August 7, 2008 response to the director's RFE, the petitioner asserted that it was the beneficiary's true employer and referenced its verbal agreement with the beneficiary. The petitioner indicated that the beneficiary would work at the petitioner's offices in Wixom, Michigan and would work as a software consultant on the petitioner's in-house project, Digital RX. The petitioner noted that the project was in its implementation phase with version 1.5 and that the petitioner was working on future releases of the product, version 2.0 in 2009, version 3.0 in 2010, and version 4.0 in 2012. The petitioner re-phrased the beneficiary's duties to include:

- Analyzing and formalizing requirements for various practice management systems to integrate with Digital Rx application.
- Analyze requirements for customized reports[.]
- Develop, test and implement interfaces with various practice management systems[.]
- Develop reports using Business Objects.
- Help the product deployment team with deployment of product at various client locations.

The petitioner listed the phase, timeline and resources allocated to the project. The list showed that in June 2008 to May 2009 the petitioner would allocate "PM, PLs, Business analysts, Developer and testers to version 2.0 and from September 2009 to August 2010 the petitioner would allocate the same resources to version 3.0 and that from January 2011 to April 2012 the petitioner would allocate the same resources to version 4.0.

The petitioner concluded by indicating that it needed various categories of employees like programmer analysts, software consultants, software engineers, systems analysts, systems administrators, network designers, network administrators, computer systems analysts, business analysts database administrators, project managers, architects, and project lead for its business operations. The record also includes the petitioner's tax records showing that the petitioner reported wages paid in over 25 states.

As noted above, the director denied the petition on September 9, 2008. The director observed that in response to her RFE, the petitioner had indicated that the beneficiary would work on an in-house project but that the petitioner had not provided specifics and further had not provided documentary evidence to establish that it was developing in-house software products. The director concluded that, without complete valid contracts relating to the beneficiary, the petitioner had not established that it had control of the beneficiary's actual work and the record did not contain sufficient information regarding the nature and scope of the beneficiary's services. The director found that the petitioner had not established that it is the beneficiary's employer or that it met the definition of United States employer or agent. Moreover, the director determined that without an itinerary or documentation establishing the validity of the submitted contracts, the director could not determine the beneficiary's actual work location; thus, the submitted LCA could not be determined valid. The director further found that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of valid unexpired contracts detailing the beneficiary's ultimate duties.

On appeal, the petitioner asserts that it is the beneficiary's sole employer and again listed the phase, timeline, and resources allocated to the Digital Rx project. The petitioner also lists 13 individuals working on the Digital Rx project, their titles, and their education. The petitioner further provides letters from two health practices that use the Digital Rx product. The petitioner reiterated that the beneficiary would be assigned to work on the Digital Rx project and that it would be the beneficiary's employer. The petitioner, on appeal, also includes the project plan for the referenced Digital Rx product. The plan indicates that the project structure includes a project manager, project leads, business analysts, project developers, and QA testers and provides the same phase, timeline, and resources information as provided in response to the director's RFE. The petitioner asserts that as the beneficiary would be working in the corporate offices, the LCA submitted was valid.

The petitioner contends that the proffered position qualifies as a specialty occupation and attaches a number of its advertisements to show that it normally requires a degree or its equivalent for the position. A review of the petitioner's advertisements show that it generally requests a bachelor's or master's degree in unidentified disciplines and in one advertisement requires only an associate's degree and experience (for a PL/SQL Developer) and in one instance less than a high school education and two years experience (for a computer systems analyst position). The petitioner also provides a list of advertisements from various unidentified companies that do not provide detail regarding the advertised position or the educational requirements for the positions. The petitioner also claims that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree and adds that the beneficiary is not only required to develop and test computer software but also to do the initial designing of the program.

The AAO finds that the paramount issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Thus, the director's decision on the issues of whether an employer-employee relationship exists and the validity of the LCA, the AAO affirms in general but will not further discuss, as the petition is not approvable on the crucial issue of failure to establish that the proffered position is a specialty occupation. The AAO determines that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients or in-house work to which the beneficiary may be assigned but is whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties for the actual user of the beneficiary's services and whether those duties comprise the duties of a specialty occupation.

For purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health,

education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of

professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(1) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. To accomplish this task, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that appear to comprise the duties of a specialty occupation but are not related to any actual services the beneficiary is expected to provide.

The petitioner in this matter initially provided a general overview of the beneficiary's proposed duties and did not indicate that those duties would be associated with an in-house project. Only in response to the director's RFE does the petitioner assert that the beneficiary will be assigned to an in-house project. In light of the petitioner's normal business operations of providing staffing services to third party companies, a failure to include this information with the initial petition raises questions regarding the legitimacy of the nature of the actual proffered position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Although the AAO questions the legitimacy of the position when the petition was filed, the AAO will review the initial description of the beneficiary's duties and the subsequent information provided regarding the Digital Rx product.

Upon review of the petitioner's information regarding its Digital Rx product, the AAO finds that although the petitioner has established that it has developed this product, the petitioner has not provided consistent evidence regarding the beneficiary's role to work on this project. The AAO finds that the petitioner has generally indicated that the resources for the project include “PM, PLs, Business analysts, Developer and testers.” On appeal, the petitioner lists the titles of those individuals who are currently working on the project which include the chief technology officer, the project manager/architect, a software engineer, a project manager, four software consultants, a programmer analyst, a senior developer and three other developers. The petitioner does not provide details regarding the specific duties of the software consultants or detail the specific duties the

beneficiary, as a software consultant, will perform on the project. Moreover, the petitioner's indication on appeal that the beneficiary in this matter will also do the initial design of the program appears at odds with the current phase of the product and with the petitioner's organizational chart which shows software designers as a different category from its software consultants. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the petitioner's addition of this task appears to be an improper material change to the petition in an effort to make the deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner in this matter has provided a general outline of duties but no specifics that would indicate that a degree beyond that of an associate degree and/or certifications in a particular programming language is necessary. The description shows, at most, that the beneficiary should have a basic understanding of particular computer programs, an understanding that could be attained with a lower-level degree or certifications in the programs. In addition, the petitioner has not provided a description of the beneficiary's daily duties that is specifically connected to identified elements, applications, or endeavors related to the petitioner's development of the Digital Rx product. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO acknowledges the information in the record that shows the petitioner recruits individuals with a baccalaureate or higher degree for some positions. However, the AAO also observes that the petitioner does not routinely recruit for individuals that have a baccalaureate or higher degree in a specific discipline. In addition, the majority of the petitioner's advertisements are generic, as would be for a staffing company that does not have identifiable positions available to prospective applicants. Contrary to the petitioner's contention that an employer's self-imposed requirements establish that a particular position is a specialty occupation, the AAO emphasizes that it is not the education of specific individuals that establishes that the duties of their positions comprise the duties of a specialty occupation; rather it is the actual detailed job description that must be analyzed to determine whether a position is a specialty occupation. In this regard, the AAO reiterates that the critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. As the record in this matter does not include a detailed description of the beneficiary's actual duties for the petitioner or any client to whom the beneficiary may be assigned, the petitioner has not established the proffered position is a specialty occupation.

The petitioner has not provided sufficient evidence to establish that the individuals in the petitioner's generic software consultant position only work on assignments that require a theoretical and practical application of highly specialized knowledge. General statements and an overview of proposed work are insufficient to establish that a specific proffered position is a specialty occupation. The general outline of duties that varies each time the petitioner has provided a response to USCIS in this matter is insufficient to establish that the beneficiary's actual duties as they might relate to the Digital Rx project comprise the duties of a specialty occupation. The description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform.

Without evidence of statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.*

Although the *Defensor* court noted that evidence of the client companies' job requirements is critical, where the work is performed for entities other than the petitioner, the AAO finds that as in this matter, when the record does not include a comprehensive description of the beneficiary's actual duties as they relate to specific project(s) for the duration of the requested employment period, even if for the petitioner, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, and a comprehensive description of the beneficiary's

duties from the ultimate user of the beneficiary's services as those duties relate to specific projects. In this matter, the petitioner has failed to provide such evidence.

The AAO observes that the petitioner's self-imposed standards in its recruitment of computer personnel without the specific details necessary to ascertain that the actual work to be performed requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, does not establish that the position is a specialty occupation. Similarly, the failure to provide a comprehensive description of the proposed duties of the position prevents a determination that the duties associated with the position are specialized and complex. Based upon the general description of the duties of the proffered position, the AAO is unable to analyze whether the beneficiary's duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The petition will be denied and the appeal dismissed for the above stated reason. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the director's decision will be affirmed.

ORDER: The appeal is dismissed. The petition is denied.